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IN THE  
**SUPREME COURT OF THE  
UNITED STATES**

OCTOBER TERM, A. D. 1943.

**No. 575**

ISRAEL A. ABRAMS, ET AL., BERNARD SHULMAN  
AND MEYER ABRAMS,

*Petitioners,*

vs.

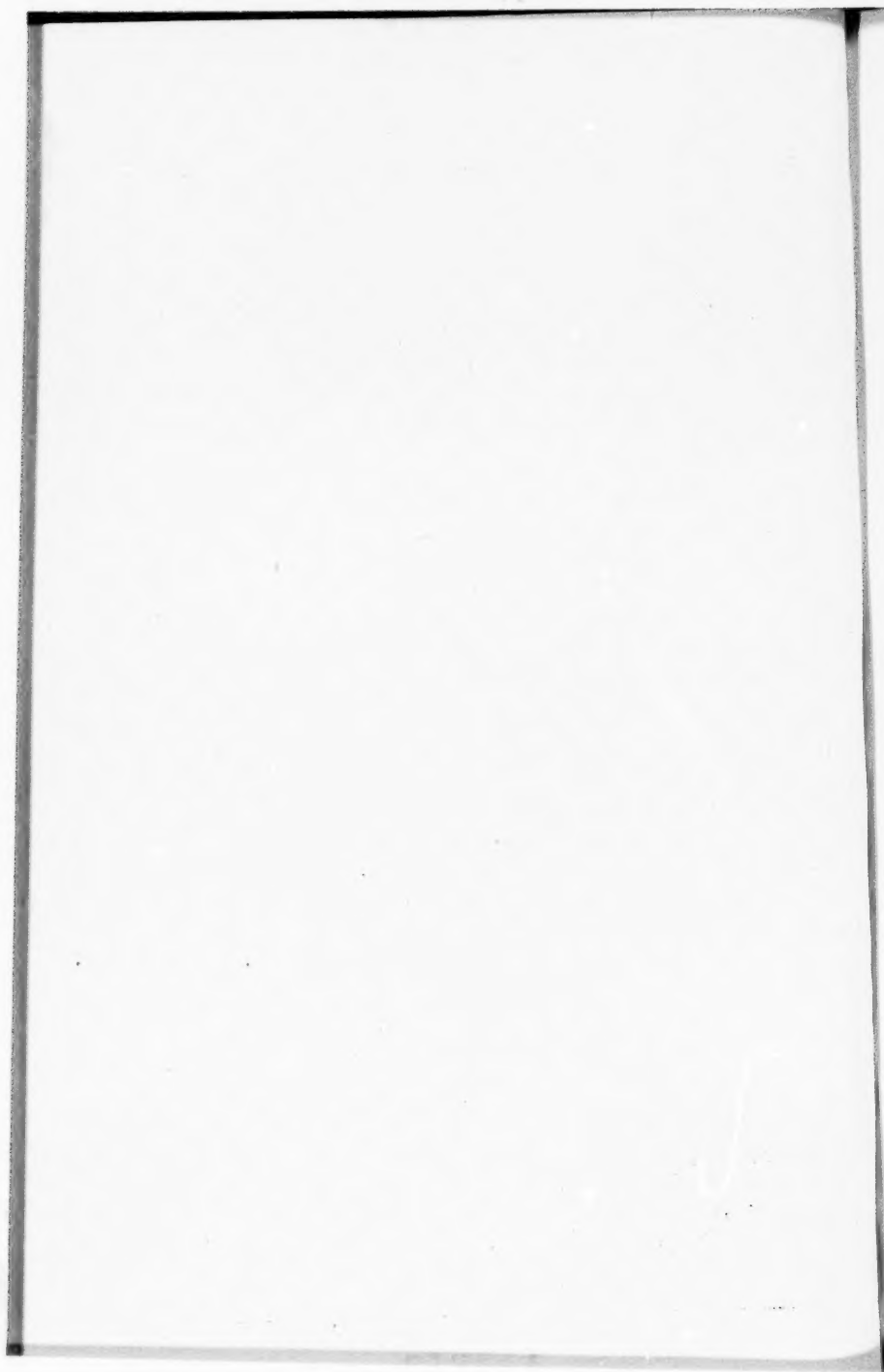
HENRY A. SCANDRETT, WALTER J. CUMMINGS  
AND GEORGE I. HAIGHT, TRUSTEES OF THE PROPERTY  
OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD  
COMPANY,

*Respondents.*

**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT AND BRIEF  
IN SUPPORT THEREOF.**

MEYER ABRAMS,  
*Counsel for Petitioners.*

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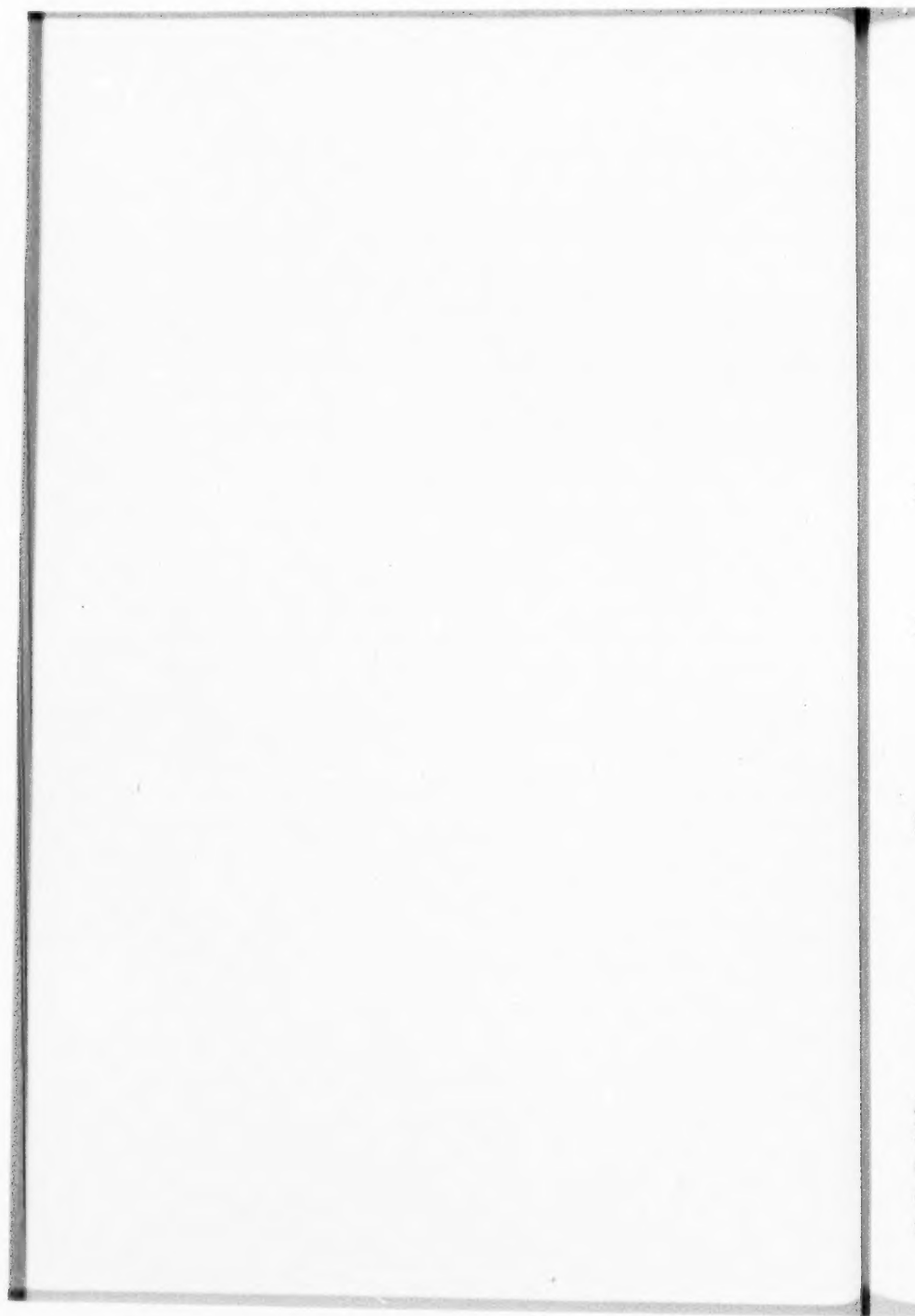
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**No.**

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ISRAEL A. ABRAMS, ET AL., BERNARD SHULMAN  
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HENRY A. SCANDRETT, WALTER J. CUMMINGS  
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COMPANY,

*Respondents.*

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**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT.**

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*To the Honorable, the Chief Justice and the Associate  
Justices of the Supreme Court of the United States:*

Petitioners, Israel A. Abrams, *et al.*, a group of Adjustment Mortgage Bondholders, and Meyer Abrams and Bernard Shulman, their counsel, pray for the issuance of a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to review its judgment of November 4, 1943.

### STATEMENT OF THE MATTER INVOLVED.

The petitioners, consisting of a group of Adjustment Mortgage Bondholders, were allowed to intervene before the Interstate Commerce Commission, as well as before the District Court in the early part of the proceedings, in August, 1935. The other petitioners, Meyer Abrams and Bernard Shulman, are their counsel who appeared in their behalf throughout the proceedings.

The petitioners, counsel for the group of the Adjustment Mortgage bondholders, performed services before the District Court as well as before the Interstate Commerce Commission from the period commencing July 1, 1935, to May 1, 1940, covering in excess of 1,000 hours and they asked an allowance of \$12,500.00 for such service. (R. 13, 21). They also asked for reimbursement of expenses in the amount of \$436.80 (Tr. 22-23; R. 21)\*

The Interstate Commerce Commission fixed "nothing" as the "maximum limit" for the expenses incurred and for the compensation requested. The District Court approved its order on November 13, 1940, when it overruled the objections of the Petitioners on the ground that no matter how beneficial the services were, the Court was powerless to make any allowance above the "maximum limit" of "Nothing" (R. 9). Its decision was affirmed by the Seventh Circuit on May 20, 1941, and a rehearing was denied on June 12, 1941 (121 F. (2d) 371). This Court denied *certiorari* in case 631 on November 10, 1941 (314 U. S. 679), and denied a rehearing on December 8, 1941 (314 U. S. 714). Thereafter, on February 8, 1943, this court allowed a Writ of

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\* The reference "R" is to the printed record on the former appeal in Nos. 2529 and 2537, which records were filed here in case No. 631, and were made a part of this record by the order of the court (Tr. 52). The reference "Tr." is to the printed record in this case.

Certiorari in another case which involved the construction of Section 77 (c) 12. In deciding that case this Court concluded that the Seventh Circuit erred in its construction of Section 77 (c) 12 on the appeal taken by these petitioners (*Reconstruction Finance Corp. v. Bankers Trust Co.*, 318 U. S. 163).

On February 17, 1943, petitioners applied to the Seventh Circuit for another rehearing based on the decision of this court in the *Reconstruction Finance case*, *supra*. The Court of Appeals was at first of the opinion that it was without jurisdiction to grant a rehearing and on February 18, 1943, it denied the application. However, upon a subsequent reconsideration, it concluded that it had jurisdiction. It vacated the denial of the rehearing on March 22, 1943, granted a rehearing, and reversed the order of the District Court with directions to examine the evidence to see if there was substantial evidence to support the findings of the Commission (Tr. 10-11).

Upon the filing of the mandate issued by the Court of Appeals reversing the previous order (Tr. 10-11) the matter was submitted to the District Court upon the record made before the Commission on the hearing on the fee application, and on the record in case Nos. 7529-7537 filed here in case No. 631, and on volumes I to V in case Nos. 7610-7617 filed here in case Nos. 13, 32.\*

On June 8, 1943, the District Court filed *ex parte* "Findings and Conclusions" (Tr. 27) to the effect that there was "substantial evidence" to support the report of the Commission, and that the maximum of "nothing" was sustained by "substantial evidence". It entered an

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\* The Court of Appeals permitted the reference to such volumes without reprinting them (Tr. 52).

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order simultaneously therewith, overruling the objections and sustaining the Report (Tr. 28). On June 16, 1943, Petitioners moved to vacate the *ex parte* "Findings of Facts and Conclusions" on the ground that they were not in compliance with Rule 52 (a), and tendered to it "proposed findings" and "propositions of law" (Tr. 28-32). The Court took the matter under advisement, and on June 21, 1943, it denied the motion to vacate its findings and conclusions, and rejected the proposed findings and conclusions of the petitioners (Tr. 23).

The order of the District Court was affirmed by the Circuit Court of Appeals on November 4, 1943 (Tr. 56-61) and on November 24, 1943, it denied a rehearing (Tr. 63). This Petition is filed in order to review the decision of the Circuit Court of Appeals confirming the order below.

### **THE MATERIAL FACTS.**

The Petitioners, a group of the Adjustment Mortgage Bondholders were allowed to intervene by the District Court on July 24, 1935, and by the Interstate Commerce Commission on August 3, 1935 (Tr. 14; R. 15) and were represented by the other petitioners, Meyer Abrams and Bernard Shulman as their counsel.

Petitioner Meyer Abrams appeared before the Interstate Commerce Commission at Washington, D. C., at the hearings held on the debtor's 1935 Plan, on August 5, 6, and 7, 1935 (Tr. 15). He actively participated in these hearings in the examination and cross-examination of witnesses and in the argument. He opposed the Debtor's plan of 1935 which was then sponsored by the Institutional Groups and other interests. His opposition was mainly on the ground that the railroad, which had

emerged a bankrupt from the previous reorganization in 1928, would not have improved its position as a result of the new reorganization under the 1935 plan, if adopted. He brought out the facts that while the general mortgage in the amount of \$138,788,800, was to remain "contingent" as to one-third of the interest payable from income, if any, this was no improvement, because such contingent interest was "cumulative" and became a definite obligation in 10 years. On default when such interest matured, there was the danger that the 50 year mortgage, amounting to \$106,000,000 (which was a junior lien) and the new stock which was to be given in exchange for the Adjustment Mortgage Bonds under the Plan, would be completely wiped out (Vol. I, pp. 401-420).

He also showed that the \$106,000,000 "50 year mortgage" which was changed to the extent that the entire interest became "contingent" also contained "cumulative" provisions maturing in 10 years. In the event of a default under that mortgage, the new stock (which was to be given in exchange for the Adjustment Mortgage Bonds) would be wiped out (Vol. I, pp. 405-415). It was shown by him that on the basis of the actual earnings for the period covering the years 1932, 1933 and 1934, there would be a deficiency of \$1,500,000 to meet the "fixed" interest charges under the proposed plan, besides the "contingent" interest (Vol. I, p. 403). It was therefore evident that the plan was unfeasible; that the railroad would have emerged a bankrupt from the reorganization, and would have been in no better position than it was when it emerged from the 1928 reorganization.

At the date of these hearings, the only other group which represented some of the Adjustment Mortgage

Bonds was the Institutional Group. But, this group held most of the senior securities and was primarily interested in such securities and sponsored the plan. Petitioners were the only group who opposed it. The Trustee under the Adjustment Mortgage Bonds was not a party to the proceedings in 1935 on the debtor's plan. This Plan also contemplated a Voting Trust, and the Voting Trustees were selected in advance of the filing of the plan so that no representation was given to the class of the Adjustment Mortgage Bonds which debt aggregated approximately 35% of the total debt of the debtor (Tr. 17; Vol. I, pp. 413-414).

The debtor and its counsel sponsored the Plan, as being fair, equitable and feasible at the hearings in 1935. They were then supported by the Institutional Groups. The record was closed upon which the Commission was to file its report on the Plan. On June 16, 1937, the debtor asked to reopen the case and conceded that the Plan was not feasible because of the cumulative features and that changes in the Plan were deemed necessary (Vol. II, p. 600). Petitioners were not represented at that hearing. The Institutional groups even then contended that the Plan was fair and feasible (Vol. II, p. 630). In September, 1937, the Debtor and the Institutional Groups joined forces in urging an indefinite delay on the ground that changes were necessary. This was opposed by Petitioners who urged that the Commission should formulate a plan of its own. At a subsequent hearing held September 20, 1937, further delay was sought, which was opposed by Petitioners (Vol. II, p. 636). At this hearing Petitioner Meyer Abrams pointed out that it was necessary to change the complete corporate structure and to eliminate the Divisional mortgages (Vol. II, pp. 666-667). The Commission sustained Mr. Abrams in denying a

further continuance and closed the hearing. By an *ex parte* order further time was granted to file an amended Plan (Tr. pp. 16-17).

An amended Plan was filed on January 10, 1938, which eliminated some of the objectionable features of the Debtor's Plan. Petitioners participated in the hearing before the Commission in February 1938 on the Amended Plan and pointed out its objectionable features. They were active in producing evidence and in arguing the points before the Commission (Vol. II, pp. 821-822). They also opposed the 5% on Series B of the new mortgage and urged 4½% (pp. 821-822), and opposed the Voting Trust.

The Examiner for the Commission later rendered his report, to which petitioners and other creditors filed objections. The objections were sustained, and on February 12, 1940, the Commission adopted a Plan of its own whereby the Adjustment Mortgage Bondholders were to receive Common Stock under the Plan. The Voting Trust was completely eliminated. Petitioners filed objections to certain features, and thereafter, on June 4, 1940, the Commission filed a Supplemental Report wherein it included a Voting Trust but gave representation to the Adjustment Mortgage Bondholders to name one of the trustees (239 I. C. C., p. 485). Petitioners filed their objections to the Plan in the District Court. Hearings were had, leading up to the entry of a decree approving the Report, from which Petitioners appealed and were successful in their appeal in that the Circuit Court of Appeals reversed the affirmance of the Plan (124 F. (2) 754). Subsequently, this Court reversed in part the order of the Circuit Court of Appeals (318 U. S. 523).

Petitioners filed their petition on May 25, 1940 (R. 13-22), and testified before the Commission (Tr. 13-26). The Commission filed its Report, fixing the "maximum" allowance of fees at \$312,624 (R. 71), which included a "maximum" of "Nothing" for fees and expenses to the Petitioners (R. 79). The District Court affirmed this order (Tr. 28), and upon appeal it was affirmed by the Circuit Court of Appeals (Tr. 62).

### **THE QUESTIONS PRESENTED.**

1. Whether Rule 52(a) is applicable to the report of the Commission which lacked essential findings, and whether it was the duty of the District Court to comply with the rule or to adopt the proposed findings as presented by the Petitioners.

2. Whether the construction of § 77(c) 12 that the word "nothing" is included in the word "maximum" and that the Interstate Commerce Commission acted within its jurisdiction when it fixed "nothing" as a "maximum limit" was proper, and whether the Court of Appeals erred in upholding such action on the part of the Commission which is clearly contrary to the plain language of the Act.

3. Whether a report of a Commission may be affirmed on the ground that there is substantial evidence to support its findings upon a record which is barren of any evidence to support it and where the alleged substantial evidence is based on an unwarranted assumption that the Commission knew everything that transpired before it and, therefore, its finding may said to be supported by substantial evidence, when no such evidence appears in the record.



4. Whether the District Court merely sat as a court of review in performing its functions under § 77(c) 12 to allow compensation within the "maximum limit" as fixed by the Commission, or whether it was required to act independently and judicially in making the allowance, and its judicial functions were usurped by the Commission when it fixed "nothing" as the "maximum limit" and left no room for the court to exercise its sound judgment in making any allowance.

5. Whether the District Court merely passed on questions of law in performing its duty to make allowances under § 77(c) 12, and therefore no findings are required under Rule 52a, or whether it passed on the evidence in order to determine what allowances, if any, to make, and what expenses to allow, and in the absence of essential findings of the Commission it was required to make findings under Rule 52(a).

6. Whether attorneys who performed services in good faith in an attempt to obtain equitable treatment for the common benefit of the members of the class are to be denied any compensation because they were not finally successful in their efforts when the Commission changed its mind and incorporated a Voting Trust in its supplemental report and when the reversal of the order below which petitioner obtained (124 F. (2) 754) was upset by the decision of this Court (318 U. S. 523).

#### **REASONS FOR THE ALLOWANCE OF THE WRIT.**

1. Petitioners were aggrieved by the original order when the maximum of "nothing" was affirmed on the misconstruction of the Act. They appealed and were unsuccessful. They applied for the writ of *certiorari* to this Court, which was denied. Two years later this Court

granted *certiorari* to another applicant and decided that the decision in the instant case was erroneous. Petitioners were compelled to devote a great deal of effort in order to obtain a rehearing and a reversal of the order. They finally succeeded in obtaining a reversal of the order with directions to examine the evidence to ascertain whether there was "substantial evidence" to support the report. The District Court filed so-called "Findings and Conclusions" which are neither "findings" nor "conclusions" and simply stated that there was "substantial evidence" (Tr. 27). Petitioners tendered to the Court "proposed findings" (pp. 29-32) which were sustained by the undenied proof. The District Court refused to adopt the findings and satisfied itself with the mere statement that there is "substantial evidence" to support the report.

In affirming the decision that there is such substantial evidence to support the report, the Court of Appeals was unable to point to anything in the record where the alleged substantial evidence is to be found. It rested its decision on the unwarranted assumption that the Commission was acquainted with the nature of the services, and that the "substantial evidence" consisted of the "assumption" that when the Commission fixed "nothing" as a "maximum" it knew that the services performed were worth "nothing." This "assumption" constitutes the "substantial evidence" to which the court below referred. There was no need to reverse the first order with directions to ascertain if there was "Substantial Evidence" to support the report if the assumption that the Commission knew what the services were and who benefited the estate existed, and the directions were but empty phrases and meaningless.

Such a decision is not in harmony with the decisions of this court in reviewing the findings of a Commission. Such a decision will make it impossible to obtain a review from any decision of an Administrative Agency for it may always be said that the Agency knew what it was doing. This assumption of the alleged knowledge is not a substitute for the "substantial evidence" which is required to support a Report, and which evidence is completely lacking in this case. The writ of *certiorari* should therefore be issued to review such a decision.

2. The construction of § 77(c) 12 that the Commission may fix "nothing" as a "maximum limit" is contrary to the concurring opinion of Mr. Justice Douglas in the *Bankers Trust case*, *supra*, and can find no support in the opinion of this court.

3. The decision that the question whether an Administrative Report is supported by substantial evidence involves only a question of law, when the evidence is not in dispute, is in conflict with the decision of the Eighth Circuit in *Rossieur v. Comm. of Int. Rev.*, 129 F. (2d), 820, holding that this involves a question of fact, and is also in conflict with the decision of the Court of Appeals for the District of Columbia, and to harmonize the decisions the writ should be issued.

4. The question whether Rule 52(a) is applicable to Reports of Commission which lack essential findings, is a question that deserves a determination by this Court.

5. The decision of the court that the Report of the Commission is supported by substantial evidence when no such evidence appears in the record, as conceded by the respondents, and the resort to "assumptions" as a substitute for "substantial evidence" is highly improper. This court repudiated the construction of the Seventh Circuit of § 77 (c) 12 on the previous appeal which was

taken by these petitioners, although it denied the writ to the petitioners in their application. The writ should now be issued to remove the improper construction of the statute as announced in the new decision.

6. The construction of the term "benefit" by the Seventh Circuit to the effect that it means "final success" and that attorneys who performed services in good faith and obtained results leading to a reversal of the order below by the Court of Appeals were not entitled to compensation because the Supreme Court finally reversed the decision of the Court of Appeals, is contrary to the spirit of the law. This construction will affect many members of the bar who have performed services in the various Railroad reorganizations, and who were finally unsuccessful because of the law which was announced by this court in the *Milwaukee* and *Western Pacific* cases on points which could not have been anticipated by the attorneys when they performed their services.

In the interest of the Bench and Bar a review should be allowed in order to obtain a proper construction of § 77(c) 12.

#### Prayer for Relief.

WHEREFORE, the above petitioners by their counsel jointly and severally pray the issuance of a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to the end that its judgment may be reversed, and for such other relief as to this court may seem meet.

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